90-935

No. ——

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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CENVILL INVESTORS, INC., a Florida corporation, f/k/a Century Village East, Inc.; COMMUNICATIONS & CABLE, INC., a Florida corporation; C.V.R.F. DEERFIELD, LTD., a Florida limited partnership, by and through its general partner, Holrod Realty Holding Company, a New York corporation; and D.R.F., INC., a Delaware corporation, Lessors,

Petitioners,

v.

CONDOMINIUM OWNERS ORGANIZATION OF CENTURY VILLAGE EAST, a not-for-profit corporation; ASHBY "A" CONDOMINIUM ASSOCIATION, INC., a not-for-profit corporation; and AMADEO TRINCHITELLA, Lessees,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of Florida, Fourth District

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state statute which deprives a person of property based upon unverified allegations without a hearing related to the merits of the claim unconstitutional on its face as a violation of the due process clause of the Fourteenth Amendment?

2. Is a state statute, which allows a condominium unit owner or a condominium association to pay rent into a court registry if the unit owner or the association initiates any action against the lessor, unconstitutional as applied where the lessor was not permitted to present any evidence on the merits of the claim and in the absence of any claim of a property interest in the escrowed funds by the unit owners or the association?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the Lessors, CENVILL INVESTORS, INC., a Florida corporation, f/k/a Century Village East, Inc.; COMMUNICATIONS & CABLE, INC., a Florida corporation; C.V.R.F. DEERFIELD, LTD., a Florida limited partnership, by and through its general partner, HOLROD REALTY HOLDING CO., a New York corporation; and D.R.F., INC., a Delaware corporation, and the Lessees, CONDOMINIUM OWNERS ORGANIZATION OF CENTURY VILLAGE EAST, INC., a Florida not-for-profit corporation, ASHBY "A" CONDOMINIUM ASSOCIATION, INC., a Florida not-for-profit corporation; and AMADEO TRINCHITELLA.

A. Lessor CENVILL INVESTORS INC., a Florida corporation, f/k/a Century Village East, Inc., n/k/a CV REIT, INC., has the following parent companies, subsidiaries or affiliates:

Imnet, Inc.	(parent)
D.R.F., Inc.	(affiliate)
B.R.F., Inc.	(affiliate)
W.P.R.F., Inc.	(affiliate)
CCI Golf Management, Inc.	(affiliate)
Cen-Deer Communities, Inc.	(affiliate)
CCI Management, Inc.	(affiliate)
Village Management, Inc.	(affiliate)
Cen-West Management, Inc.	(affiliate)
Cen-West Communities, Inc.	(affiliate)
Cenvill Recreation, Inc.	(affiliate)
CCI Services, Inc.	(affiliate)
Village Recreation, Inc.	(affiliate)
Satellite Management Group, Inc.	(affiliate)
Village TV Productions, Inc.	(affiliate)
Comark Construction Management Corp.	(affiliate)
Comark, Inc.	(affiliate)
CCI of the Polo Club, Inc.	(affiliate)

Imnet Corporation of Delaware, Inc.	(affiliate)
Imnet Marketing Corp.	(affiliate)
Imnet Research & Development Corp.	(affiliate)

B. Lessor COMMUNICATIONS & CABLE, INC., a Florida corporation, n/k/a IMNET, Inc., has the following parent companies, subsidiaries and affiliates:

11% of the stock of IMNET, INC. is owned by First American Bank which is now controlled by the Resolution Trust Corporation.

CV REIT, INC. is a wholly-owned subsidiary of IMNET, INC. All other wholly owned subsidiaries are set forth in Section A above. There are no other parent companies, subsidiaries or affiliates.

C. Lessor C.V.R.F. DEERFIELD, LTD., a Florida limited partnership, has no parent companies, subsidiaries or affiliates.

D. Lessor Holrod Realty Holding Co., a New York corporation, as general partner of C.V.R.F. DEERFIELD, LTD., a Florida limited partnership, has no parent companies, subsidiaries, or affiliates.

E. Lessor D.R.F., INC., a Delaware corporation, has the following parent companies, subsidiaries and affiliates:

D.R.F., Inc. is a wholly owned subsidiary of IMNET, Inc. All affiliates are set forth in Section A above.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vii
INTRODUCTORY PRAYER	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
I. THE STATE COURT SUSTAINED THE VALIDITY OF A STATE PREJUDGMENT SEIZURE STATUTE AGAINST AN ATTACK THAT THE STATUTE, FACIALLY AND AS APPLIED, VIOLATES THE DUE PROCESS CLAUSE BY PERMITTING SEIZURE OF PRIVATE PROPERTY WITHOUT A CLAIM TO THE PROPERTY	10
A. The Lessors Have A Substantial Interest In The Property	12
B. The Procedures Used Create A Substantial Risk of Erroneous Deprivation	14
C. The State's Interest Is Minimal	18

TABLE OF CONTENTS—Continued

Page

II. THE DECISION FINDING THE STATE STATUTE VALID IN THE FACE OF AN ATTACK BASED UPON THE STATUTE'S REPUGNANCY TO THE UNITED STATES CONSTITUTION RAISES IMPORTANT UNRESOLVED ISSUES ABOUT THE SCOPE AND PERMISSIBILITY OF A STATUTE DESIGNED TO DEPRIVE A PERSON OF PROPERTY WITHOUT DUE PROCESS AND IS RIPE FOR REVIEW 20

A. The Repugnancy Of Florida's Statute To The United States Constitution Raises Important Unresolved Due Process Issues 20

B. The Federal Issue Has Been Finally Decided By The Florida State Courts 22

C. The Federal Issue Has Been Preserved For Review And Is Not Moot 23

CONCLUSION 26

APPENDIX

Opinion of the District Court of Appeal of the State of Florida, Fourth District 1a

Order of the Supreme Court of the State of Florida 12a

TABLE OF AUTHORITIES

Cases — Page

American Railway Express Co. v. Levee, 263 U.S. 19, 44 S.Ct. 11, 68 L.Ed. 140 (1923) 23
Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) 10, 17, 18
Asarco Incorporated v. Kadish, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989) 22, 23
Association of Flight Attendants, AFL-CIO v. Delta Airlines, Inc., 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1781 (1990) 25
Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 17 L.Ed. 531 (1863) 10
Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 383 (1971) 16, 17, 18
Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) 10, 11
Cenvill Investors, Inc. v. Condominium Owners Organization of Century Village East, Inc., 556 So.2d 1197 (Fla. Dist. Ct. App. 1990) 2
Chernin v. Welchans, 844 F.2d 322 (6th Cir. 1988) .. 13, 19
Chicago Board of Realtors, Inc. v. City of Chicago, 819 F.2d 732 (7th Cir. 1987) 19
Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) .. 13
Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) 22
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) 22
Florida v. Meyers, 466 U.S. 380, 104 S.Ct. 1852, 80 L.Ed.2d 381 (1984) 23
Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, *reh'g denied*, 409 U.S. 902 (1972) .. 10, 13, 14, 15, 21
Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) 20
Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 10, 12, 14, 18, 19

TABLE OF AUTHORITIES—Continued

	Page
Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.E.2d 30 (1978)	13
Miami Herald Publishing Company v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974)	22, 23
Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974)	15
North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975)	11, 12, 14
Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979)	24
Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1979)	15
Reeve Aleutian Airways, Inc. v. United States, 889 F.2d 1139 (D.C. Cir. 1989)	25
Saul v. Basse, 375 So.2d 290 (Fla. Dist. Ct. App. 1979)	16, 17, 18
Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969)	13, 14
The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988)	23
Transwestern Pipeline Company v. Federal Energy Regulatory Commission, 897 F.2d 570, *reh'g denied*, 904 F.2d 64 (D.C. Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 373 (1990)	25
Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977)	24

Miscellaneous

U.S. CONST. art. I, § 10	3
U.S. CONST. amend. XIV, § 1	3
28 U.S.C. § 1257 (1990)	3
28 U.S.C. § 1257(a) (1990)	2, 3
28 U.S.C. § 2403(b) (1976)	2
Fla.Stat. § 718.401 (1987)	3
Fla.Stat. § 718.401(4) (1987)	3, 4, 11
Fla.Stat. § 718.401(4)(a) (1987)	*passim*
Fla.R.App.P. 9.030(2)(A)(i)	9
Fla.R.App.P. 9.130(a)(3)(C)(iii)	8

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Petitioners,

v.

CONDOMINIUM OWNERS ORGANIZATION OF CENTURY VILLAGE EAST, a not-for-profit corporation; ASHBY "A" CONDOMINIUM ASSOCIATION, INC., a not-for-profit corporation; and AMADEO TRINCHITELLA, Lessees,

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Petition for a Writ of Certiorari to the District Court of Appeal of the State of Florida, Fourth District

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTORY PRAYER

The Lessors, CENVILL INVESTORS, INC., a Florida corporation, f/k/a Century Village East, Inc.; COMMUNICATIONS & CABLE, INC., a Florida corporation; C.V.R.F. DEERFIELD, LTD., a Florida limited partnership, by and through its general partner, Holrod Realty Holding Company, a New York corporation; and D.R.F., INC., a Delaware corporation, respectfully pray that a Writ of Certiorari issue to review the Opinion of the

District Court of Appeal of the State of Florida, Fourth District, entered in the above-entitled proceeding on February 14, 1990, for which the Florida Supreme Court refused review on September 14, 1990.

OPINIONS BELOW

The Opinion of the District Court of Appeal of the State of Florida, Fourth District, is reported as follows: *Cenvill Investors, Inc., etc., et al. Appellants/Cross-Appellees, v. Condominium Owners Organization of Century Village East, Inc., etc., et al., Appellees/Cross-Appellants,* 556 So. 2d 1197 (Fla. Dist. Ct. App. 1990), and is reprinted in the Appendix hereto at page 1a.

The Order of the Florida Supreme Court is not reported to date but is reprinted in the Appendix hereto at page 12a.

JURISDICTION

On February 14, 1990, the District Court of Appeal of the State of Florida, Fourth District, issued its Opinion upholding the constitutionality of Fla.Stat. § 718.401 (4) (a) (1987), in the face of Lessors' direct challenge to the constitutionality of the Statute. App. 1a.

Lessors timely petitioned to the Florida Supreme Court for discretionary review of the Opinion of the District Court of Appeal of the State of Florida, Fourth District. On September 14, 1990, the Florida Supreme Court declined to exercise its discretion to review the Opinion of the District Court of Appeal of the State of Florida, Fourth District. App. 12a.

28 U.S.C. § 2403(b) (1976) may be applicable in this case since this proceeding involves the constitutionality of a state statute.

The jurisdiction of this Court to review the Opinion of the District Court of Appeal of the State of Florida, Fourth District, is conferred by 28 U.S.C. § 1257(a) (1990).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. U.S. CONST. amend. XIV. § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. U.S. CONST. art. I, § 10:

No State shall . . . pass any . . . Law impairing the Obligation of Contracts.

C. 28 U.S.C. § 1257. State courts; certiorari:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

D. Fla. Stat. § 718.401 (1987). Leaseholds.—

(4) (a) In any action by the lessor to enforce a lien for rent payable or in any action by the association or a unit owner with respect to the obligations of the lessee or the lessor under the lease, the unit owner or the association may raise any issue or interpose any defense, legal

or equitable, that he or it may have with respect to the lessor's obligations under the lease. If the unit owner or the association initiates any action or interposes any defense other than payment of rent under the lease, the unit owner or the association shall, upon service of process upon the lessor, pay into the registry of the court any allegedly accrued rent and the rent which accrues during the pendency of the proceeding, when due. If the unit owner or the association fails to pay the rent into the registry of the court, the failure constitutes an absolute waiver of the unit owner's or association's defenses other than payment, and the lessor is entitled to default. The unit owner or the association shall notify the lessor of any deposits. When the unit owner or the association has deposited the required funds into the registry of the court, the lessor may apply to the court for disbursement of all or part of the funds shown to be necessary for the payment of taxes, mortgage payments, maintenance and operating expenses, and other necessary expenses incident to maintaining and equipping the leased facilities or necessary for the payment of other expenses arising out of personal hardship resulting from the loss of rental income from the leased facilities. The court, after an evidentiary hearing, may award all or part of the funds on deposit to the lessor for such purpose. The court shall require the lessor to post bond or other security, as a condition to the release of funds from the registry, when the value of the leased land and improvements, apart from the lease itself, is inadequate to fully secure the sum of existing encumbrances on the leased property and the amounts released from the court registry.

STATEMENT OF THE CASE

Lessor CENVILL INVESTORS, INC ("CVE") is the original Lessor under Long-Term Leases ("Recreation Leases") for certain "Recreational Facilities" serving the unit owners of Century Village East, a condominium in Broward County, Florida. Lessee ASHBY "A" CONDO-

MINIUM ASSOCIATION, INC. ("Ashby") is among the 253 "Lessee Associations" at Century Village East. Lessee AMADEO TRINCHITELLA ("Trinchitella"), is among the 8,508 individual unit owners ("Lessees") at Century Village East. Each Lessee is directly responsible to the Lessor for payment of all rental amounts due under the Recreation Leases. The Lessee Associations pay no rent. CONDOMINIUM OWNERS ORGANIZATION OF CENTURY VILLAGE EAST is an advisory umbrella organization for the Lessee Associations and Lessees but is not itself a Lessee Association or Lessee. The Recreation Leases, executed at various points after 1975, govern the obligations of the Lessees to pay rent to the Lessor for use and management of the Recreational Facilities.

On May 18, 1981, CVE and 88 of the 253 Lessee Associations entered into Amendments to certain of the Recreation Leases ("1981 Amendments"). The 1981 Amendments revised the Recreation Leases to provide for two types of Recreational Facilities rent, Base Rent and Operational Rent. Base Rent is defined in the 1981 Amendments as the amount due from each Lessee to the Lessor for rental of the Recreational Facilities. Operational Rent is defined as the amount due from each Lessee to the Lessor for operation of the Recreational Facilities.

In December of 1981, CVE and Lessor D.R.F., Inc. ("DRF") executed an Agreement of Lease, conveying to DRF, as Tenant, CVE's rights under the Recreation Leases. Lessor C.V.R.F. Deerfield, Ltd. ("CVRF") succeeded to the remaining interests of CVE as Landlord.

Sometime after 1981, disagreements arose between DRF, the Lessee Associations and the Lessees regarding management of the Recreational Facilities. Between 1981 and 1988, the parties attempted unsuccessfully to resolve the differences through an agreement ("1987 Agreement") executed in 1987 and a subsequent Letter Agreement. The Letter Agreement was signed by Lessor COM-

MUNICATIONS & CABLE, INC ("CCI") on behalf of the Management/Lessors. The Letter Agreement sets the Operational Rent for 1988 at $20.57 per month per Lessee.

Despite the series of agreements, COOCVE filed an unverified Complaint against CVE, CVRF, DRF and CCI in 1988. Subsequently, a Second Amended Complaint was filed, adding ASHBY and TRINCHITELLA as plaintiffs. No other Lessee Association or Lessee was made a party. The action was not brought as a class action. The unverified Second Amended Complaint sought a declaration of the rights of COOCVE, the Lessee Associations and the Lessees under the Recreation Leases, sought to enjoin Lessors from allegedly ignoring directives of COOCVE and a Recreation Committee appointed by the Lessees. The Second Amended Complaint also sought damages for Lessors' alleged breaches of the Recreation Leases, an accounting, and appointment of a Receiver to collect all rents due under the Recreation Leases during the pendency of the litigation.

Along with the original Complaint, COOCVE filed and served its Motion for Entry of Order Allowing Deposit of Funds into Court Registry ("Motion for Deposit") pursuant to Fla.Stat. § 718.401(4)(a) (1987). Although, in order to avoid an arbitration dispute, Lessees acknowledged they had no dispute with the amount of Base Rent or past or current Operational Rent, the Motion for Deposit sought deposit of all rents accrued and accruing during the litigation.

On July 26, 1988, the Motion for Deposit came on for hearing. Lessees argued that Fla.Stat. § 718.401(4)(a) (1987), was self-executing and required neither hearing nor evidence and that the sole reason for the hearing was that the Court Clerk refused the deposits in the absence of a Court Order. Lessees further urged that the Statute was applicable based solely upon the allegations of the Second Amended Complaint and that any ruling on the Motion for Deposit should be limited to a review of the Statute and the Second Amended Complaint.

Lessors argued against any deposit of rents pursuant to the Statute without the due process safeguard of a hearing. Lessors also argued that the Statute did not apply under the circumstances since its effect was to deprive Lessors of the use of their property during the litigation even though Lessees acknowledged the litigation did not involve the rents. Finally, Lessors urged that the Statute, as applied, constituted an unconstitutional impairment of the Recreation Leases entered into prior to the current version of the Statute since there was no evidence establishing Lessees' right to apply the Statute to these Recreation Leases. At several junctures, Lessors asked the trial court to allow evidence on the applicability of the Statute.

The trial court refused to hear any evidence and ruled for Lessees solely upon the unsworn allegations of the Second Amended Complaint, its exhibits, and the arguments of Lessees' counsel. After orally ruling on the Motion for Deposit, the trial court, because of the complexity and expense of administering the funds through the Court Registry during the litigation, suggested the parties attempt to agree on an alternative procedure whereby the rents would be paid into and drawn from a joint checking account.

On August 9, 1988, the trial court entered its Order on Plaintiff's Motion to Deposit Rents into the Court Registry ("Order on Motion to Deposit"). The Order on Motion to Deposit ordered Lessees, including the non-party Lessees, to deposit all rent, accrued and as accruing into the Court Registry and provided that the Court Registry would release the amount of Base Rent to Lessors on the first and fifteenth of every month. The Operational Rent would stay in the Court Registry pending further order of the trial court.

The Order on Motion for Deposit specifically provided for the establishment of an account, with a depository in

lieu of the Court Registry, if a procedure could be established by the parties.

Following entry of the Order on Motion to Deposit, Respondents filed their Motion to Compel Alternative Deposit Procedures ("Motion to Compel") in an attempt to force Lessors to agree to the alternative procedures suggested by the trial court. After Lessees filed the Motion to Compel, Lessors and Lessees executed a Joint Stipulation Regarding Depository In Lieu Of Court Registry ("Depository Stipulation") and a Joint Stipulation Regarding Disbursement From the Recreation Escrow Account ("Disbursement Stipulation"). The two Stipulations were executed by Lessors in an attempt to arrive at a less onerous procedure than the Court Registry and to meet the continuing need to release funds for preservation of the Recreational Facilities during the litigation. The two Stipulations expressly preserve to Lessors all rights, claims and positions in the underlying litigation. Pursuant to the Disbursement Stipulation, Lessors are allowed to withdraw only those funds absolutely necessary for the preservation and maintenance of the Recreational Facilities.

On September 2, 1988, Lessors filed their Notice of Appeal from the Order on Motion to Deposit pursuant to Fla.R.App.P. 9.130(a)(3)(C)(iii), which provides for interlocutory appeals from non-final orders affecting the right to immediate possession of property. On appeal, Lessors again argued Fla.Stat. § 718.401(4)(a) (1987) was constitutionally infirm because of its failure to provide for the due process requirement of a meaningful hearing at a meaningful time. Lessors also argued that the trial court's refusal to require evidence allowed Lessees to deprive Lessors of their property in the absence of any showing of entitlement and in the absence of any showing that the Statute did not impair Lessor's Recreation Leases.

On February 14, 1990, the District Court of Appeal of the State of Florida, Fourth District ("District Court"), issued its Opinion in the above matter. App. 1a. The Opinion recognizes that the "main issue on appeal calls into question the constitutionality of Section 718.401(4)(a), Florida Statutes (1987)." App. 1a. The Opinion recites that the Statute does not fit within the parameters of any due process concerns raised by this Court or by the Florida Supreme Court since the Statute effects neither a prejudgment replevin nor a garnishment. While recognizing the controlling precedent from this Court, the District Court did not apply any further due process analysis to the Statute. App. 6a.

Then turning its focus to the impairment of contract argument, the District Court concluded that the Statute passed constitutional muster since it allowed an evidentiary hearing for personal hardships and provided that deposited funds would accrue interest for the benefit of the party prevailing in the litigation. App. 9a. Having found the Statute did not unreasonably impair Lessors' contracts, the District Court declined any further analysis of the Statute or its applications.

On March 14, 1990, Lessors filed their Petition for Review with the Florida Supreme Court, seeking review of the Opinion pursuant to Fla.R.App.P. 9.030(2)(A)(i), on the basis that the Order expressly declared valid a state statute. On September 14, 1990, the Florida Supreme Court declined to accept jurisdiction and denied the Petition for Review.

The litigation below is ongoing. The matter has not been set for trial. The parties are still operating under the Order on Motion for Deposit and the Stipulations.

REASONS FOR GRANTING THE WRIT

I. THE STATE COURT SUSTAINED THE VALIDITY OF A STATE PREJUDGMENT SEIZURE STATUTE AGAINST AN ATTACK THAT THE STATUTE, FACIALLY AND AS APPLIED, VIOLATES THE DUE PROCESS CLAUSE BY PERMITTING SEIZURE OF PRIVATE PROPERTY WITHOUT A CLAIM TO THE PROPERTY.

Due process protects private property from mistaken or unjust deprivation through the arbitrary use of state power and procedures. In order for the due process requirement to be met, a party deprived of property must be given a hearing. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; . . .'" *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556, *reh'g denied*, 409 U.S. 902 (1972), citing *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233, 17 L.Ed. 531 (1863). It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes*, 407 U.S. at 81, 92 S.Ct. at 1994.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (citation omitted). However, the fact that a hearing is not fixed in form does not affect the root requirement of constitutional due process that an individual be given an opportunity for a hearing before he is deprived of any significant property interest. *Boddie v. Connecticut*, 401 U.S. 371, 378-79, 91 S.Ct. 780, 786,

28 L.Ed.2d 113 (1971). *See also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606, 95 S.Ct. 719, 722, 42 L.Ed.2d 751 (1975).

In contrast to the due process requirements recognized by this Court, Florida Statute § 718.401(4)(a) effects a state authorized prejudgment seizure of property by permitting a lessee to deposit a lessor's property into the Court Registry based upon conclusory allegations contained in an unverified complaint, without an affidavit and without bond. The Statute does not provide for a predeprivation hearing or a hearing on the merits immediately after the seizure occurs. There is no requirement that the lessee claim any property right or security interest in the deposited funds. In this case, Lessees have affirmatively stated they would not be entitled to the rent even if successful in the underlying litigation. The Statute allows the deprivation to occur by mere application to the Court Clerk without judicial supervision. Although in this case the trial court signed the Order on Motion to Deposit, it did not permit the Lessors to introduce any evidence, and did not consider the merits of the Lessee's underlying claims. The only postdeprivation hearing authorized by the Statute impermissibly shifts the burden to the lessor to demonstrate need or hardship before any funds are released from the Court Registry, and impermissibly limits inquiry to need or hardship. Any one of these factors on its own would constitute a violation of due process. Combined, these shortcomings are fatal to the Statute on its face and as applied to the facts in this case.

The District Court reviewed applicable United States Supreme Court and Florida Supreme Court prejudgment garnishment and attachment cases and summarily concluded that Florida Statute § 718.401(4) "does not fit within the parameters of these due process concerns." App. 6a. The District Court, reciting two familiar examples of prejudgment seizure: replevin of personal

property standing as security and third party garnishment, then found: "The instant case follows neither of these scenarios. Instead, we have a contract requiring a lessee to pay periodic rent to a lessor in consideration of the use of premises." App. 6a, 7a. Without further elaboration, the District Court erroneously held the Lessors had not been deprived of due process.

The proper analysis was developed in *Mathews v. Eldridge*, 424 U.S. at 335, 96 S.Ct. at 903:

> . . . [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The District Court erred by failing to apply the considerations raised in the *Mathews* three-part test to Fla. Stat. § 718.401(4)(a) (1987) as applied in this case.

A. The Lessors Have A Substantial Interest In The Property.

The first prong of the *Mathews* test measures the private interest affected. The Lessors in the instant case have a substantial private interest in receiving rent from the Lessees. The Lessors' right to receive rent is "property" protected by the due process clause. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 608, 95 S.Ct. 719, 723, 42 L.Ed.2d 751 (1975) this Court recognized there exists a difference between consumers being deprived of household appliances and businesses being deprived of bank accounts, yet held, "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due

Process Clause." The Sixth Circuit has held a landlord's interest or expectation in receiving monies due under a rental agreement is a "property interest" within the meaning of the Fourteenth Amendment. *Chernin v. Welchans*, 844 F.2d 322, 325 (6th Cir. 1988), citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), and *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). Further, this Court made clear in *Fuentes* that the Fourteenth Amendment speaks of "property" generally. "It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are necessary." *Fuentes*, 407 U.S. at 90, 92 S.Ct. at 1999.

In contrast to the Lessors' substantial property rights in the rent, the Lessees have expressly disclaimed any property right in the rents to be protected. In *Fuentes*, 407 U.S. at 78, 92 S.Ct. at 1993, the court rejected a Pennsylvania statute which did not even require a party seeking a writ of seizure to "allege that he is lawfully entitled to the property." Rather, pursuant to the Pennsylvania statute, "the state seizes goods simply upon the application of and for the benefit of a private party." *Id.* at 80-81, 92 S.Ct. at 1994. Similarly, in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), this Court required an assertion of a right in the property before seizure. In his concurring opinion, Justice Harlan stated that due process is afforded only by the kinds of notice and hearing aimed at establishing the validity or probable validity of the underlying claim against the alleged debtor before he can be deprived of property. *Id.* at 343, 89 S.Ct. at 1823. In the instant case, there was no claim of entitlement, far less a valid claim. To the contrary, the Lessees admit they are not entitled to the rental income.

The seizure is not justified by the argument that the rents will be paid to Lessors at the conclusion of the case. Temporary seizure is still a seizure.

> The 'property' of which petitioner has been deprived is the *use* of the garnished portion of her wages during the interim period between the garnishment and the culmination of the main suit. Since this deprivation cannot be characterized as *de minimis*, she must be accorded the usual requisites of procedural due process: notice and a prior hearing.

Sniadach, 395 U.S. at 342, 89 S.Ct. at 1823, (Harlan, J., concurring). Similarly, the Court found the loss of use of money held in a bank account a deprivation in *North Georgia Finishing, Inc.*, 419 U.S. at 606, 95 S.Ct. at 722: "That the debtor was deprived of only the use and possession of the property, and perhaps only temporarily, did not put the seizure beyond scrutiny under the Due Process Clause."

B. The Procedures Used Create A Substantial Risk of Erroneous Deprivation.

The second prong of the *Mathews* three-part test considers the risk of an erroneous deprivation of property through the procedures used. The risk of erroneous deprivation pursuant to Florida Statute § 718.401(4)(a) is very great, and under the circumstances of this particular case, the Lessor has been deprived of property erroneously.

The risk of an erroneous deprivation of property is particularly high when a private party, serving its own interests, invokes the seizure. In *Fuentes*, the Court criticized a Florida prejudgment replevin statute as follows:

> Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another . . . No state official reviews the basis for the claim to repossession; and no state official

> evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.

Fuentes, 407 U.S. at 93, 92 S.Ct. at 2001. To pass constitutional muster, a State's procedure allowing prejudgment deprivation of property must, at a minimum, be based upon a verified petition or affidavit setting forth the nature of the claim, the amount thereof, and the grounds relied upon. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 616, 94 S.Ct. 1895, 1904, 40 L.Ed.2d 406 (1974).

In the instant case, the Lessees neither filed an affidavit, nor verified pleadings, nor did they offer evidence on the merits of the claim, yet the trial court ordered rents deposited into the court registry based upon the self-serving allegations contained in the Second Amended Complaint. There was no review of the basis of the Lessees' claim, nor an official evaluation of the need for immediate seizure. As in *Fuentes*, there was not even a requirement the Lessees provide any information to the trial court on these matters. As a result, the trial court acted largely in the dark. *Fuentes*, 407 U.S. at 93, 92 S.Ct. at 2001.

The trial court's refusal to allow an evidentiary hearing resulted in the potential for an unconstitutional impairment of Lessors' contracts. The nature of the impairment is revealed by the date of each Recreation Lease and the status of the earlier versions of the Statute as of that date. In *Pomponio v. Claridge of Pompano Condominum, Inc.*, 378 So. 2d 774 (Fla. 1979), the Florida Supreme Court held that an earlier version of the Statute was unconstitutional if applied retroactively except where a lessor had expressly consented to be bound by the Florida Condominium Act as amended from time to time. In this case, Lessors were denied the opportunity to show that the Statute would work an impair-

ment of contract since the trial court refused to accept evidence on the relevant dates of the Recreation Leases.

Precluding evidence on the merits of the claim further increases the risk of erroneous deprivation where the purpose of the seizure is to provide security for a claim. In *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 383 (1971), Georgia's Motor Vehicle Safety Responsibility Act required suspension of the Vehicle registration and driver's license of any uninsured motorist involved in an accident unless the driver posted security. The purpose of that Act was to establish a fund from which the injured person could recover in the event the uninsured motorist was found at fault. At a predeprivation hearing, the administrative hearing officer rejected a motorist's proffer of evidence that he was not at fault and gave him 30 days to post security or suffer suspension. This Court determined the State's approach was constitutionally impermissible:

> In cases where there is no reasonable possibility of a judgment being rendered against a licensee, Georgia's interest in protecting a claimant from the possibility of an unrecoverable judgment is not, within the context of the State's fault-oriented scheme, a justification for denying the process due its citizens. Nor is additional expense occasioned by the expanded hearing sufficient to withstand the constitutional requirement.

Id. at 540, 91 S.Ct. at 1590.

Like the Statute considered in *Bell*, the purpose of Florida's Statute is to establish "a secured fund which would be available to satisfy any monetary judgment obtained in favor of petitioners against respondents." *Saul v. Basse*, 375 So.2d 290, 292 (Fla. Dist. Ct. App. 1979). This is supported by the provisions of the Statute itself:

> The court shall require the lessor to post bond or a security as a condition to the release of funds from

> the Registry when the value of the leased land and improvements, apart from the lease itself, is inadequate to fully secure the sum of existing encumbrances on the leased property and the amounts released from the court registry.

As in *Bell*, there is no chance in this case the fund will be used to pay a judgment to the Lessees. Rather, the Lessees affirmatively admit that should they prevail on all issues in the underlying litigation, they will not receive the funds which have been seized. Where there is no reasonable possibility that the Lessees will be entitled to the seized funds, a procedure depriving the Lessors of these funds without giving them the opportunity to address that issue is arbitrary, erroneous and does not provide the process which is due.

The only hearing contemplated by the Statute impermissibly requires the lessor to bear the burden of proof of hardship. In *Armstrong*, an adoption decree was ruled constitutionally invalid because the procedure used shifted the burden of proof. Without notice or hearing, a juvenile court judge deprived a natural father of all legal relationship and all rights of parenthood. The Texas Court of Civil Appeals held that whatever constitutional infirmity resulted had been cured by the subsequent hearing on the natural father's motion to set aside the decree. This Court disagreed because the burden of proof shifted to the natural father on the subsequent motion. The Court held that, had the father been given timely notice and an opportunity to be heard, the natural mother and adoptive father would have the burden of proving their case including an affirmative showing as to why the father's consent to adoption was not required. "Had neither side offered any evidence, those who initiated the adoption proceedings could not have prevailed." *Armstrong*, 380 U.S. at 551, 85 S.Ct. at 1191. Instead, the natural father was faced on his first appearance in court with the task of overcoming an adverse decree. Recognizing a shift of burdens might alter the

outcome, the Court held the Texas procedure violated due process.

Similarly, the only hearing provided by Fla.Stat. § 718.401(4)(a) (1987) shifts the burden to the lessor to prove need or hardship before funds are released from the Court Registry. The Statute does not require the lessee to make any evidentiary showing. Based upon *Armstrong*, this shifting of burdens may alter the outcome leading to an erroneous result. As such, the procedure is constitutionally impermissible.

C. The State's Interest Is Minimal.

Most cases analyzing the government's interest in a due process context involve a concern for protection of the government's own fisc. In *Mathews*, for example, the Court determined the government's interest in minimizing administrative burdens and the risk of improper public payment was sufficient to suspend liability benefits without first providing the recipient an evidentiary hearing.

In contrast, the judicially recognized state interest furthered by Fla.Stat. § 718.401(4)(a) (1987) is not to protect the government's fisc, but to create a fund from which a private party may recover a judgment. *Saul v. Basse*, 375 So.2d at 292. The state's interest in *Bell v. Burson*, 402 U.S. at 535, 91 S.Ct. at 1586, is identical to Florida's interest as reflected by the Statute at issue in this case. In *Bell*, this Court recognized that the additional expense which would be occasioned by an expanded hearing sufficient to meet constitutional requirements was not so great as to justify denying the process due its citizens. 402 U.S. at 540, 91 S.Ct. at 1590. Similarly, Florida's fiscal interest as reflected in the Statute cannot justify a denial of due process to Lessors.

In fact, should the District Court decision be permitted to stand, there may actually be an increase in Florida's fiscal burden. Anytime there is a dispute over

a recreational lease, regardless of claims involving rent due, lessors will be deprived of rents on even the most frivolous basis. The District Court's holding is likely to spur needless, costly, and vexatious litigation and provide a tool of coercion not intended by the Florida Legislature. As such, the existing procedures impair, rather than advance, Florida's interest in its own fisc.

Rent deposit statutes have been upheld by the federal courts in the face of similar constitutional claims. *Chernin v. Welchans*, 844 F.2d 322 (6th Cir. 1988); *Chicago Board of Realtors, Inc. v. City of Chicago*, 819 F.2d 732 (7th Cir. 1987). However, in addition to providing numerous pre-seizure safeguards, those rent deposit statutes secure substantial governmental interests, including enforcement of minimum housing codes under the Police Power and provisions for safe and sanitary housing. The protected interests are recognized basic necessities and far more important than the Lessees' amorphous claims regarding control of the non-essential Recreational Facilities. The "management control" issues raised by the Lessees in this case do not warrant the same heightened governmental interest as the unconscionable rent escalations which the Statute originally sought to prevent. Nor is the rent deposit necessary to equalize bargaining positions, even if that were an appropriate governmental interest. As corporate entities with mandatory fund raising ability and the ability to spread costs broadly, condominium associations are at no bargaining disadvantage with developer/lessors.

Based on the three-part test developed in *Mathews*, Florida Statute § 718.401(4)(a) does not satisfy due process concerns articulated by the United States Constitution and by this Court. The Statute allows the erroneous deprivation of substantial property without a hearing and without serving any valid government interest. Review by this Court would extend the *Mathews* analysis to an area not previously considered by this

Court and would afford previously denied due process protection to Lessors.

II. THE DECISION FINDING THE STATE STATUTE VALID IN THE FACE OF AN ATTACK BASED UPON THE STATUTE'S REPUGNANCY TO THE UNITED STATES CONSTITUTION RAISES IMPORTANT UNRESOLVED ISSUES ABOUT THE SCOPE AND PERMISSIBILITY OF A STATUTE DESIGNED TO DEPRIVE A PERSON OF PROPERTY WITHOUT DUE PROCESS AND IS RIPE FOR REVIEW.

A. The Repugnancy Of Florida's Statute To The United States Constitution Raises Important Unresolved Due Process Issues.

In a series of cases construing the requirements of due process, this Court has concluded that a State may not destroy a property interest without first giving the putative owner an opportunity to be heard. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), and cases cited therein. "Opportunity" carries with it the requirement that the hearing be at a meaningful time and in a meaningful manner.

The Statute under review provides none of the constitutional protections afforded by the United States Constitution and mandated by this Court for a lessor of property upon which any portion of a condominium development exists. Lessees themselves describe the Statute as automatic and acknowledge it requires no hearing.

Not only is the Statute facially deficient, but the Florida courts have refused to correct the deficiencies in enforcing the Statute against Lessors. The trial court applied the Statute without allowing Lessors a meaningful opportunity to be heard. The District Court, after concluding the Statute did not "fit within the parameters" of this Court's due process concerns, App. 6a, up-

held the constitutionality of the Statute and its application to Lessors. While unclear in the Opinion, it appears the District Court reasoned that because neither traditional garnishment nor replevin procedures were followed, there was no "seizure." App. 6a. The Florida Supreme Court declined to review the Opinion of the District Court.

As a result of the state court decisions, Florida has finally determined the Statute is not violative of the due process clause of the Fourteenth Amendment and does not work an unconstitutional deprivation upon Lessors. In Florida, where condominium living is wide-spread and where developers commonly retain rights to condominium recreational facilities, the impact of the Statute is unquestionable. In any case where suit is filed by an association or unit owners against a lessor of condominium property with regard to the lease, the lessor's funds are held ransom pursuant to the Statute pending the outcome of the litigation. This is so even where the litigation is unrelated to any rentals due under the lease.

This Court has not previously considered the constitutionality of a rent deposit statute of this genre. The District Court distinguished the cases previously considered by this Court on the basis that this case does not involve a "seizure." The distinction, however, is illusory. In this case, the rentals are the property of Lessors. The seizure of the rentals is as real, and as constitutionally infirm, as those in the cases cited by the District Court in its Opinion. The due process analysis employed by this Court in *Fuentes*, 407 U.S. at 80, 92 S.Ct. at 1994, should apply no less to the Statute merely because the Lessors' property had not been delivered to their possession prior to the seizure.

The District Court, in providing its limited and narrow analysis of due process requirements, has highlighted the reason why this Court should grant review. If the District Court is of the opinion that due process requirements

apply only to property already delivered into the possession of the putative owner, there is a strong likelihood that other courts may be of the same erroneous opinion. This Court has the opportunity to correct the misapprehension of due process requirements by granting review.

B. The Federal Issue Has Been Finally Decided By The Florida State Courts.

This Court has jurisdiction to review the Statute immediately. Review of a state court decision upholding the constitutionality of a statute has been granted by this Court even where there remain matters to be disposed of below. *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). In *Cox Broadcasting*, 420 U.S. at 481, 95 S.Ct. at 1039, this Court held a judgment or decree of the highest state court on a federal issue is final even where additional proceedings are anticipated in the lower state courts where "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." In *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 247 n.6, 94 S.Ct. 2831, 2834, 41 L.Ed.2d 730 (1974), this Court sustained its jurisdiction in the face of an attack that the order appealed from was not final:

> Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the statute under review] could only further harm the operation of a free press.

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), this Court again emphasized its conviction that a state court's final decision on a federal claim was immediately reviewable no matter how further proceedings resolve the remaining issues. The doctrine was applied in *Asarco Incorporated*

v. Kadish, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989), in which this Court held it had jurisdiction to review the federal question raised and finally decided by the Arizona state courts even where further proceedings were to take place at the state level. *Florida v. Meyers*, 466 U.S. 380, 104 S.Ct. 1852, 80 L.Ed.2d 381 (1984), presents a procedural pattern identical to this case. This Court had before it for review a case where the District Court erred and the Florida Supreme Court denied a petition for discretionary review. Even though the District Court remanded the case for a new trial, this Court recognized that the state court decision on the federal constitutional issue was immediately reviewable since no further state review was possible and since the federal constitutional issue might evade further review as a result of proceedings below.

As in *Miami Herald Publishing*, 418 U.S. at 247, 94 S.Ct. at 2834, the opinion of the District Court creates an "uneasy and unsettled constitutional posture" of the Statute which can only further harm the operation of condominiums in the State of Florida. Lessors have been deprived of their property without any meaningful statutory protection and in the absence of any claim to the property by any other party. The decision of the Florida state courts in that regard is final. This Court had jurisdiction to grant discretionary review.

C. The Federal Issue Has Been Preserved For Review And Is Not Moot.

In *The Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988), the Florida Supreme Court considering a question certified to it by this Court regarding timeliness of review, answered that a Florida litigant must exhaust all avenues of review available in the courts of Florida, including discretionary review by the Florida Supreme Court, prior to seeking review by this Court. A similar issue was decided in *American Railway Express Co. v. Levee*, 263 U.S. 19, 44 S.Ct. 11, 68 L.Ed. 140 (1923), in

which this Court held that the time for applying to the United States Supreme Court for a writ of certiorari ran from the date the writ of certiorari was refused by the Supreme Court of the State of Louisiana and not from the date of the decision of the Louisiana Court of Appeal.

This Court has held that it has jurisdiction to consider constitutional issues where a state court actually entertains and decides a federal question. *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979). In *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 568, 97 S.Ct. 2849, 2854, 53 L.Ed.2d 965 (1977), this Court again held it had jurisdiction to review a state court decision where the state court erred in understanding First and Fourteenth Amendment precedent from this Court:

> In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the [state] issue solely as a matter of [state] law.

In this case, Lessors' federal constitutional claims were adequately raised at every stage of the proceedings below. Lessors sought to introduce evidence before the trial court. The request was denied. Lessors argued that without the right to introduce evidence, they could not adequately defend against Lessees' argument that the Statute was applicable. On appeal, the District Court recognized the issue before it was the constitutionality of the Statute. App. 1a. The District Court reached and decided the federal question. App. 6a. As a result, the constitutional issues have been preserved for consideration by this Court.

Although the District Court expressed some concern that the constitutional issue may be moot as a result of Lessors' execution of the Stipulations, App. 3a, the concern is inappropriate. First, the District Court actually

reached and considered the constitutional issue which is now before this Court. The District Court did not rest its decision upon the mootness issue. Nothing which has transpired since the District Court rendered its Opinion has affected the constitutional issue. Second, the doctrine of mootness does not apply under the facts of this case. A case is moot if events have so transpired that a decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future. *Transwestern Pipeline Company v. Federal Energy Regulatory Commission*, 897 F.2d 570, *reh'g denied*, 904 F.2d 64 (D.C. Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 373 (1990). As long as some issues remain alive, such issues provide the constitutional requirement of case or controversy. *Association of Flight Attendants, AFL-CIO v. Delta Airlines, Inc.*, 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1781 (1990). A dispute is not moot unless there is no reasonable expectation that the alleged violations will recur and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139 (D.C. Cir. 1989).

In this case, Lessors' right to the use of their property is just as circumscribed today as it was on the day of entry of the Order on Motion to Deposit. The Stipulations effect only a change in the depository and a limited disbursement procedure on which the parties agreed for preservation of the Recreational Facilities. The Stipulations have not eradicated or supplanted the Order on Motion to Deposit. No interim relief or events have lessened the impact upon Lessors of the constitutional violation. The Statute remains in force in the State of Florida. The Order on Motion for Deposit remains in force against Lessors. This Court should grant review.

CONCLUSION

For the various reasons set forth above, this Court should issue its Writ of Certiorari to the District Court of Appeal of Florida, Fourth District, to review its decision.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JANUARY TERM 1990

Case No. 88-2394

CENVILL INVESTORS, INC., ETC., *et al.*,
Appellants/
Cross Appellees,

v.

CONDOMINIUM OWNERS ORGANIZATION OF CENTURY VILLAGE EAST, INC., ETC., *et al.*,
Appellees/
Cross Appellants.

Opinion filed February 14, 1990

Appeal and cross appeal of a non-final Order
from the Circuit Court for Broward County
George A. Shahood, Judge

John H. Pelzer of Ruden, Barnett, McClosky, Smith, Schuster & Russell, P.A., Fort Lauderdale, for appellants/cross appellees.

Louis S. Sroka and Judith R. Karp of Sachs & Sax, P.A., Boca Raton, for appellees/cross appellants.

HERSEY, C.J.

This litigation arose from a controversy between appellants as lessors of certain recreational facilities and

appellees as tenants of those facilities. Pursuant to section 718.401(4)(a), Florida Statutes (1987), a nonfinal order required rent to be paid into the registry of the court. The main issue on appeal calls into question the constitutionality of section 718.401(4)(a), Florida Statutes (1987).

Ashby "A" Condominium Association (Ashby) is a plaintiff/appellee, and an "Association Lessee" under the leases. Plaintiff/appellees, Trinchitella, is the owner of a condominium unit and an "Individual Lessee." The additional plaintiff/appellee is the Condominium Owners Organization of Century Village East, Inc. (COOCVE), a Florida not-for-profit corporation. COOCVE, in its capacity as agent for the condominium associations, has entered into various contracts with the lessors, appellants.

The Second Amended Complaint filed by the lessees alleged that the lessors failed to allow the COOCVE Recreation Committee to exercise policy-making and decision-making powers as required by a contract between the parties. The complaint seeks a determination as to whether the committee has such decision-making powers and also seeks damages for certain allegedly unauthorized expenditures made by the lessors.

Upon motion of the plaintiff/lessees and without an evidentiary hearing, the trial court entered the order now on appeal requiring rent to be paid into the registry of the court.

Rent under the long-term leases is of two types. There is an increment referred to as "base rent" which is payment for rental of the facilities. A second increment is referred to as "operational rent" which is used to defray expenses such as maintenance, janitorial services and landscaping.

The trial court ordered periodic disbursement of base rent to the lessors and established a method for deter-

mining the appropriateness of disbursements of operational rent from time to time.

Before addressing the issues as presented by the parties, we pause to make reference to an aspect of the pleadings and certain actions of the parties that lend a suggestion of mootness to our inquiry. Both the pleadings and material in the transcript suggest that there is no controversy concerning the amount of rent that is due. In addition, the parties by agreement have arrived at a mutually satisfactory arrangement for payment and disbursement of rent during the pendency of the litigation, so that payment is not being made into the registry of the court. Even so, we do not choose to rest our disposition upon mootness since there remain issues constituting a case and controversy.

We treat the cross appeal first. Appellees contend that the trial court erred in ordering periodic and automatic disbursement from the registry of the court to appellants of all "base rent" without an evidentiary hearing or any showing of the presence of factors specified in the statute as justifying disbursement. In view of concessions by appellees in the pleadings and elsewhere in the record that no dispute exists with regard to the base rent, we find that any error is harmless and affirm as to the cross appeal.

Turning next to the direct appeal, appellants present four issues for our consideration. First, it is argued that section 718.401(4), Florida Statutes (1987), was improvidently invoked by appellees and thus erroneously applied by the trial court. Appellants take the position that the statute does not apply in a case such as this where neither the amount of rent nor the lessors' entitlement to it is placed in issue. In four counts the second amended complaint seeks declaratory relief, injunctive relief and damages related to the lessors refusal to allow meaningful participation by the COOCVE Recreation Committee in policy-making decisions regarding

the operation of the recreational facilities. The amount of rent due from time to time is not in controversy.

The portion of the statute material to this question provides:

> (4)(a) In any action by the lessor to enforce a lien for rent payable or in any action by the association or a unit owner with respect to the obligations of the lessee or the lessor under the lease, the unit owner or the association may raise any issue or interpose any defense, legal or equitable, that he or it may have with respect to the lessor's obligations under the lease. If the unit owner or the association initiates any action or interposes any defense other than payment of rent under the lease, the unit owner or the association shall, upon service of process upon the lessor, pay into the registry of the court any allegedly accrued rent and the rent which accrues during the pendency of the proceeding, when due.

This is an action by an association and a unit owner with respect to obligations of the lessor under the lease. By the plain language of the statute, therefore, it applies to the controversy between these parties.

The dual purpose of the statute also lends support to the proposition that it should apply under these circumstances. One purpose of the statute is explained in *Saul v. Basse*, 375 So.2d 290 (Fla. 2d DCA 1979):

> [§ 718.401(4)(1)] contemplates the establishment of a secured fund which would be available to satisfy any monetary judgment obtained in favor of petitioners against respondents. Failure to require all rents to be deposited into the registry of the court may cause irreparable injury to petitioners in that petitioners could be required to seek other sources to satisfy any judgment they should obtain. Such alternative sources may not exist or may be insufficient to fully satisfy the judgment.

A second purpose of the statute is to require the unit owners to continue to pay rent during the pendency of litigation. This is intended to benefit the lessor who, in the absence of such a provision, might be totally deprived of rental payments throughout the course of protracted litigation and even after prevailing in that litigation might very well be confronted with the requirement of bringing suit for eviction or past due rent.

Thus, the statute, while imposing burdens, likewise affords benefits to both contracting parties. While we make no other judgment on the wisdom of the legislation, we hold that it was appropriately applied in this case.

Appellant questions the standing of plaintiff/appellee, Condominium Owners Organization of Century Village East, Inc., (COOCVE) to invoke the statute. COOCVE is obviously neither a "unit owner" nor a condominium "association." It is, rather, an umbrella organization formed as an advisory group to all of the associations and has acted as their agent in dealings with the lessors. COOCVE's standing or capacity to invoke the statute is said to be predicated upon two theories. Appellees argue first that because appellants have previously dealt with COOCVE as the agent for the associations, they are now estopped to deny that agency for purposes of this litigation. The second argument advanced by appellees is that rule 1.210 of the Florida Rules of Civil Procedure confers status upon COOCVE to entertain the present suit in its capacity as one in whose name a contract has been made for the benefit of another.

Both of these arguments miss the point. The issue is whether this statutory provision may be invoked by an organization that is neither a "unit owner" nor an "association." Under an earlier version of the statute only a "unit owner" could bring this statutory remedy into play. Strictly construing the language of the statute, the supreme court held in *Century Village, Inc. v. Wellington, E,F,K,L,H,J,M,&G, Condominium Ass'n*, 361 So.2d

128 (Fla. 1978), that an association could not invoke the statute. In the same vein, we hold that COOCVE has no standing to invoke the statute.

Appellant also challenges the constitutionality of the statute. One prong of this challenge complains of the statute's failure to provide for an evidentiary hearing prior to "seizure" of the rents. This is a due process argument of the genre of prejudgment seizures of property cases and garnishment cases. The constitutional issues in this area of the law, at the federal level, have been exposed and treated in *Sniadach v. Family Finance Corp. of Bayview*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Mitchell v. W.T. Grant*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). Florida exposure occurred in *Unique Caterers, Inc. v. Rudy's Farm Co.*, 338 So.2d 1067 (Fla. 1976), and *Ray Lein Const., Inc. v. Wainwright*, 346 So.2d 1029 (Fla. 1977). We have carefully considered the parties' argument based upon these cases but conclude that the statute we are called upon to evaluate does not fit within the parameters of these due process concerns. To illustrate:

(1) In one typical situation A buys an automobile from B on credit. Title to the automobile passes to A so that it becomes his property. B maintains only a security interest. When A defaults, B's remedies are circumscribed by due process concerns because he is attempting to seize A's property. These are the prejudgment seizure cases.

(2) In a garnishment, on the other hand, C holds property belonging to D who is indebted to E. When E attempts to garnish the property held by C, again it is D's property that E wants to "seize."

The instant case follows neither of these scenarios. Instead, we have a contract requiring a lessee to pay

periodic rent to a lessor in consideration of the use of premises. The question is whether a statute may alter the terms of that contract or "impair the obligation" of the contract.

It goes without saying that it is the retroactive application of a statute which gives rise to questions of unreasonable impairment of contract obligations and remedies. A statute in place at the time of contracting cannot be in violation of this particular constitutional prohibition. This is so because the law imposes upon the marketplace a presumption that parties enter into contracts in contemplation of existing statutory and case law. That context becomes part of the bargain and thus cannot be relied on by either contracting party to avoid an obligation or enhance a remedy. We point this out because the parties argue:

(1) Appellee: either the statute was in place, albeit in an earlier form, at the time the leases were entered into, or the condominium declaration adopts the various condominium statutes as the same may be amended from time to time, so that there can be no impairment of contract.

(2) Appellant: there is no record showing of the relative times of execution of leases and adoption of amendments to the statute so this court cannot tell, in the absence of an evidentiary hearing, to what extent there could be an impairment. Further, the leases specifically provide that no amendment to the applicable statutes shall affect the terms of the leases. Therefore, there is a possibility of impairment of the contract.

To bring the matter into focus: if our subsequent analysis leads us to conclude that application of the statute constitutes an unreasonable impairment of contract rights, then we will return to the inquiry begun here. If the statute passes constitutional muster, on the other hand, then the present inquiry into "consent" becomes moot.

The appropriate context in which an analysis of the issue of impairment of obligations of contracts must be made is article I, section 10 of the Florida Constitution and the parallel provisions of the federal constitution. We thus turn for guidance to *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1979), which deals with this aspect of constitutional law.

Pomponio was concerned with an earlier version of the statute now under consideration: section 718.401(4), Florida Statutes (1977). After tracing the federal evolution of decisional analysis of the impairments of contracts problem, the supreme court determined the statute to be constitutionally infirm and struck it down. The court reasoned that, "in the absence of contractual consent significant rights are unreasonably impaired by the statute's operation." The court noted that the lessor was permitted by the statute to withdraw from the registry amounts needed for maintenance of the property, but not the lessor's built-in profit. This latter portion of the rent might be held during the entire pendency of protracted litigation. This was felt to be a substantial impairment of the lessor's contract rights which could not realistically be balanced against the public policy sought to be effectuated by the statute. The court in fact suggested that the evils which the statute was designed to correct were largely illusory. Fatal to the balancing process, said the court, was the absence of a provision authorizing disbursement of funds upon a showing of "actual danger of loss of the premises or other personal hardship resulting from the loss of rental income from the premises," quoting section 83.61, Florida Statutes (1977), as an example of a provision that would presumably withstand constitutional scrutiny.

A special concurrence of Justice Overton points out another basis for concluding that the impairment under the earlier version of the statute was substantial and unreasonable. Funds on deposit with the court earn in-

terest. Under the 1977 statute, that interest belonged, not to the individual or entity whose claim for the underlying funds ultimately prevailed, but rather to the state for "the benefit of all of the people," pursuant to the holding of *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So.2d 951 (Fla. 1979), *rev'd*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980). Justice Overton then concludes that the statute would be constitutional "if the trial court had the authority to direct the disposition of interest earned and the lessors and lessees could be made whole if their position was upheld at the conclusion of the proceedings, ..."

In the context of the law as it existed in 1979 the statute was found to be facially unconstitutional. Two developments lead us to conclude that the constitutional impediments noted have been removed.

First, the statute has been amended to include a provision which authorizes disbursement of funds to the lessor which are shown to be "necessary for the payment of other expenses arising out of personal hardship resulting from the loss of rental income from the leased facilities." This amended language fulfills the requirement which the supreme court enunciated in *Pomponio*. The second development is a change in the law pertaining to interest on funds deposited in the registry of the court. Reversing *Beckwith*, the United States Supreme Court, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), decreed that such interest accrues to the benefit of the litigant or other interested party whose claim to the underlying funds prevails in the litigation. Thus, both the impediment to the statute pointed out by the *Pomponio* majority and the shortcoming in the statute raised by the special concurrence are no longer present. On this basis and for the foregoing reasons we hold that the present statutory scheme is not constitutionally infirm.

Because we find the statute facially constitutional it is unnecessary to further analyze the consent/estoppel aspect of application of the statute adverted to earlier.

Finding no error, with the exception of the standing of COOCVE in this litigation, we affirm except that COOCVE, upon remand, shall not be allowed to avail itself of the protection afforded under section 718.401 (4)(a), Florida Statutes (1987).

AFFIRMED AND REMANDED.

GUNTHER J., concurs.
WARNER, J., concurs specially with opinion.

WARNER, J., concurring specially.

I agree with the majority opinion and write only to add a few comments regarding the standing of COOCVE to obtain the relief of deposit of the long term lease rentals into the registry of the court pursuant to section 718.401 (4)(a), Florida Statutes (1987).

COOCVE is an umbrella organization organized to represent the 254 condominium associations comprising Century Village. COOCVE is not a condominium association for any of those condominiums and is not a party to the lease agreement. It is not involved with the collection of rents. According to the long term lease attached, rents are payable by the unit owner to the individual lessee condominium associations which remit the same to the lessor.

In addition to the majority's citation of *Century Village, Inc. v. Wellington E, F, K, L, H, J, M, & G, Condominium Ass'n.*, 361 So.2d 128 (Fla. 1978), regarding the standing of COOCVE, the Supreme Court has held that an umbrella association similar to COOCVE is not an "association" under section 718.103(2), Florida Statutes (1987). *Raines v. Palm Beach Leisureville Com-*

munity Ass'n., Inc., 413 So.2d 30 (Fla. 1982). In that case Justice MacDonald wrote:

> We can find, however, no legislative intent to cover the instant management association. The legislature might decide to include this type of association within the scope of chapter 718 in the future, but we conclude that the respondent association presently does not come within the ambit of the condominium statute.

Raines, 413 So.2d at 32.

The legislature has not seen fit to change the statute after *Raines*. As a consequence, we are now compelled to hold that COOCVE has no standing to obtain the relief of deposit of all rentals from its 254 members in the court. Of course, those associations may, and probably will, be joined in these proceedings so that such relief can be effectuated. That process will be cumbersome and unwieldy and may further complicate already complex litigation to no one's advantage. I would suggest that the legislature review this statute to determine the advisability of including umbrella organizations such as COOCVE in the definition of "association" for purposes of obtaining relief under section 718.401(4)(a), Florida Statutes (1987).

SUPREME COURT OF FLORIDA

Friday, September 14, 1990

Case No. 75,707

District Court of Appeal,
4th District—No. 88-2394

CENVILL INVESTORS, INC., ETC., *et al.*,
Petitioners,

v.

CONDOMINIUM OWNERS ORGANIZATION OF CENTURY VILLAGE EAST, ETC., *et al.*,
Respondents.

This cause having heretofore been submitted to the Court on jurisdiction briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

Notice of Cross Appeal filed by attorneys for respondents is hereby denied.

Petitioners' Motion to Strike is hereby denied.

SHAW, C.J., OVERTON, McDONALD, BARKETT and GRIMES, JJ., concur

A TRUE COPY

TEST:

/s/ Sid J. White
Clerk, Supreme Court

[SEAL]

TC

cc. Hon. Clyde Heath, Clerk
Hon. George A. Shahood, Judge
Hon. Robert E. Lockwood, Clerk

John H. Pelzer, Esquire
Thomas K. Gallagher, Esquire
Louis S. Sroka, Esquire
Peter S. Sachs, Esquire
Louise E. Tudzarov, Esquire